82-1795
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 3, 1983

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QUESTIONS PRESENTED

1. Whether a State, consistent with the protection of commercial speech under the First and Fourteenth Amendments, may adopt a sweeping ban on truthful, non-misleading advertising for a lawful product.

2. Whether a State, consistent with the First and Fourteenth Amendments, may prevent cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, non-misleading advertising for wine.

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 82-1061) in the United States Court of Appeals for the Tenth Circuit: Cablecom-General, Inc. (now Capital Cities Cable, Inc.), Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc., appellees, and Richard A. Crisp, Director, Oklahoma Alcoholic Beverage Control Board, appellant.*

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* Petitioners construe the terms "parent companies," "subsidiaries," and "affiliates" in Rule 28.1 of the Rules of this Court to mean those corporations (1) the shares of which are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of the shares of which are owned by a party. With the terms so defined, petitioner Capital Cities Cable, Inc., has a parent company, Capital Cities Communications, Inc., and no subsidiaries or affiliates; petitioner Multimedia Cablevision, Inc., has a parent company, Multimedia, Inc., and no subsidiaries or affiliates; petitioner Cox Cable of Oklahoma City, Inc., has a parent company, Cox Communications, Inc., and no subsidiaries or affiliates; and petitioner Sammons Communications, Inc., has no parent, subsidiaries, or affiliates.

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Capital Cities Cable, Inc. (formerly Cablecom-General, Inc.), Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc. respectfully petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review that court's judgment of January 24, 1983, in *Cablecom-General, Inc. v. Crisp*, No. 82-1061, which was decided together with *Oklahoma Telecasters Association v. Crisp*, No. 82-1058, in a single opinion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 699 F.2d 490 and appears as Appendix A to this petition. The opinion of the United States District Court for the Western District of

Oklahoma granting a preliminary injunction is not reported and appears as Appendix D to this petition. The district court's opinion on summary judgment is also not reported and appears as Appendix G to this petition.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. On March 21, 1983, the court of appeals denied a petition for rehearing filed by petitioners. Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; Article 27, Section 5 of the Constitution of the State of Oklahoma; Section 516 of the Oklahoma Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516; Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3); and Section 76.55(b) of the rules of the Federal Communications Commission, 47 C.F.R. § 76.55(b). These provisions are set forth in Appendix H to this petition.

STATEMENT OF THE CASE

Petitioners operate cable television systems in the state of Oklahoma. Much of petitioners' cable service is composed of programming that originates outside Oklahoma and that is received by petitioners' systems—by means of antenna, microwave receiver, or satellite dish—and retransmitted by wire to their subscribers. II R. 8.[1] In some cases, petitioners' carriage of signals from out-of-state television stations is mandated by the Federal Communications Commission's so-called "must-carry"

[1] References to "I R. ——" and "II R. ——" are to Volumes 1 and 2 of the record in this matter on appeal in the United States Court of Appeals for the Tenth Circuit.

rules.[2] II R. 34-35, 52-55. Most of the out-of-state programming, however, is selected by the cable operators themselves, and it is this programming which typically furnishes the systems' primary appeal to subscribers. II R. 8, 10, 34. Out-of-state programming voluntarily carried by petitioners includes the signals of commercial television broadcast stations located in neighboring Kansas, Missouri, and Texas and the signals of so-called "super stations" located in such cities as Atlanta and Chicago.[3] II R. 32-33, 34-35, 53. This programming contains, from time to time, commercials for brands of wine. II R. 33, 39. The wine commercials are lawful under federal law and in the states where they originate. App. G at 41a. While it does not appear in the record, petitioners also provide advertiser-supported national cable programming services, such as the Cable News Network (CNN) and the USA Network, which also typically include wine commercials.[4]

The sale and consumption of alcoholic beverages are lawful in the state of Oklahoma. 699 F.2d at 500, App. A at 19a-20a; App. G at 42a. By statute and in its constitution, however, the state makes it unlawful "for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516.[5] The act specifically defines wine as an alcoholic beverage within the scope of the advertising ban. *Id.* at

[2] 47 C.F.R. §§ 76.57-.61 (1982).

[3] A "super station" is an independent television station whose signal is relayed via statellite to cable systems beyond the normal reach of its over-the-air signal.

[4] Petitioners also offer subscribers the option of receiving, at an extra charge, certain so-called "pay" services, such as Home Box Office (HBO), that contain no advertising.

[5] *See also* Okla. Const. art. 27, § 5.

§ 506(3). The advertising of beer is permitted. 699 F.2d at 492, 502, App. A at 3a-4a, 23a.[6]

The liquor advertising ban has for some years been interpreted by the state to forbid Oklahoma broadcast television stations from broadcasting wine commercials as part of the national network programming they carry. In upholding this application of the ban, the Oklahoma Supreme Court relied heavily on its finding that television stations are able to delete wine commercials from the network programming. *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines*, 566 P.2d 1158, 1160, 1162 (Okla. 1977).

At the same time, the Oklahoma Attorney General has construed the liquor advertising ban not to apply to advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, including publications specifically designed for circulation within the state.[7] Out-of-state publications may be delivered to Oklahoma subscribers and sold at outlets within the state even though they contain wine or liquor advertising. 699 F.2d at 493 n.1, 502, App. A at 5a, 23a-24a.

For many years, the state applied a similar policy to cable operators, and they were permitted to carry out-of-state programming containing wine commercials. 699 F.2d at 492, App. A. at 4a; App. G at 41a. In March 1980, however, the Oklahoma Attorney General issued an opinion stating that retransmission of such wine commercials by cable systems operating in Oklahoma would be considered in violation of state law. Op. Okla. Att'y

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[6] The state's definition of alcoholic beverages includes beer containing more than 3.2 percent alcohol by weight. Okla. Stat. Ann. tit. 37, § 506(3). However, because beer advertising does not generally specify alcoholic content, the advertising of beer generally is allowed. 699 F.2d at 492, App. A. at 3a-4a.

[7] *See, e.g.*, Op. Okla. Att'y Gen. No. 76-348 (November 24, 1976).

Gen. No. 79-334 (March 19, 1980). Respondent Richard Crisp, Director of the Oklahoma Alcoholic Beverage Control Board, notified all Oklahoma cable operators, including petitioners, that they faced imminent criminal prosecution if they continued to carry the out-of-state wine commercials. 699 F.2d at 492, App. A at 4a; App. G at 41a.

Cable television operators are prohibited by federal law from altering or modifying the content of the broadcast television signals, including commercials, that they carry to their subscribers. 699 F.2d at 492, App. A. at 4a; App. G. at 40a. Section 76.55(b) of the Federal Communications Commission's rules, 47 C.F.R. § 76.55(b) (1982), requires that broadcast television programming retransmitted by a cable system "shall be carried in full, without deletion or alteration of any portion." The Commission has specifically held that the section forbids the deletion of commercial messages.[8] Moreover, the Copyright Act of 1976 expressly prohibits cable systems operating under the statutory compulsory licensing system from willfully deleting a commercial advertisement from a television signal, subject to a minor exception not applicable here. 17 U.S.C. § 111(c)(3).[9]

Even if deletion of the out-of-state wine commercials were lawful, there would be, as the district court found here, "no feasible way for [petitioners] to block out the

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[8] *See Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978) ("Section 76.55(b) of the Rules . . . is meant to prohibit advertising deletions as well"); *WAPA-TV Broadcasting Corp.*, 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417, 444 (1968).

[9] The Act permits, in certain circumstances, deletion of commercial advertising "by those engaged in television commercial advertising market research." 17 U.S.C. § 111(c)(3). The compulsory copyright license for cable operators was created by Congress because it was deemed infeasible for cable systems that carry the signals of numerous television stations to attempt to negotiate individual agreements with each of many different copyright owners for the right to carry every program broadcast by each station. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

advertisements." App. G at 41a. Petitioners have no contractual relationship with the out-of-state television stations whose signals they carry, no control over the programming included in those signals by the stations, and no advance notice from the stations concerning the scheduling of wine commercials. App. G at 40a; II R. 38-40, 56-57. Petitioners' reception and retransmission of the broadcast television signals occur simultaneously. II R. 45. As a practical matter, therefore, even if it were lawful to do so, petitioners would be unable to delete each wine commercial in its entirety as it appears; even to attempt to delete the major part of each wine commercial would require an extremely burdensome and costly effort by petitioners to monitor each signal continuously. App. D at 29a; II R. 38-41, 45-46, 54-58.[10]

Petitioners would thus be compelled to discontinue their carriage of all signals from commercial television stations located outside Oklahoma if they were forbidden from retransmitting out-of-state wine commercials. This would deprive Oklahoma residents of access to the programming offered by the Atlanta, Chicago and other "super stations," as well as that provided by other, less distant stations whose signals are available to Oklahoma residents only by means of cable retransmission. The record indicates that some Oklahoma towns would receive no broadcast television signal at all if cable operators could not import signals from outside the state. II R. 55.

Failure to carry out-of-state signals would place some cable operators in violation of the Federal Communications Commission's "must-carry" rules, 47 C.F.R. §§ 76.57-.61 (1982), which require them to carry certain out-of-state signals to their subscribers. II R. 34-35, 52-55. Failure to transmit out-of-state signals would also in some cases

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[10] *See also Cable Television Report and Order*, 36 F.C.C.2d 143, 154-56, 165 (1972) (Commission rejects as unworkable its own proposal that would have required some cable systems to delete commercials from certain distant television signals).

be contrary to cable operators' franchise agreements with the communities they serve. App. G at 42a; II R. 55. Finally, by preventing their carriage of out-of-state broadcast signals, Oklahoma's ban on out-of-state wine commercials would deny cable operators the ability to offer much of their most popular programming. II R. 10, 34, 55. As the district court found, this would cause the operators a substantial loss in subscriber revenue, App. G at 42a, in some cases imperiling their financial viability. II R. 34.

District Court Proceedings

After being warned by state officials that they would be prosecuted if they continued to retransmit out-of-state wine commercials, petitioners brought an action on March 3, 1981, in United States District Court for the Western District of Oklahoma against respondent Richard Crisp in his official capacity as director of the Oklahoma Alcoholic Beverage Control Board. I R 1. Petitioners sought injunctive relief against application of Oklahoma's liquor advertising ban to their carriage of out-of-state wine commercials and programming containing such commercials and sought a declaratory judgment that such application would, *inter alia*, violate their rights to freedom of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.[11]

Following an evidentiary hearing, the district court on March 6, 1981, issued a preliminary injunction enjoining Crisp from enforcing the ban against petition-

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[11] Petitioners also alleged that enforcement of the liquor advertising ban against them would violate the Commerce and Supremacy Clauses of the United States Constitution, Articles I and VI, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343, and 2201 and 42 U.S.C. § 1983.

ers' carriage of out-of-state wine commercials. Appendix D. On December 18, 1981, the district court entered summary judgment for petitioners and issued a permanent injunction. Appendices E, F.[12] An opinion supporting the orders was filed by the court on February 10, 1982. Appendix G.[13]

The district court found that the wine commercials carried by petitioners were not false or misleading and did not advocate unlawful activity, App. G at 47a, and held that they therefore were entitled to First Amendment protection under the decisions of this Court regarding commercial speech. *Id.* The court ruled that Oklahoma's "blanket suppression," *id.* at 49a, of this advertising violated the First Amendment, relying on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and other decisions of this Court for the proposition that in the area of commercial speech "the State cannot totally prohibit the dissemination of truthful information about a lawful activity." App. G at 46a.

The court rejected the contention that Oklahoma's power to regulate liquor under the Twenty-first Amendment superseded the requirements of the First Amendment. *Id.* at 45a-46a. The court also found that the liquor advertising ban failed to satisfy the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because it had been shown to serve only remotely and ineffectively, if at all,

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[12] On the same date, the district court awarded summary judgment and injunctive relief to a group of Oklahoma broadcast television stations that had brought a separate lawsuit challenging on First Amendment grounds the state's prohibition of their broadcast of wine commercials as part of their carriage of national network programming. *Oklahoma Telecasters Association v. Crisp*, No. Civ-81-439-W (W.D. Okla. December 18, 1981), *rev'd*, 699 F.2d 490 (10th Cir. 1983).

[13] The February 10 opinion replaced an opinion filed with the original orders. As the court of appeals noted, the opinions were "nearly identical." 699 F.2d at 493, App. A at 5a.

the state's asserted interests in temperance and discouragement of alcohol abuse. *Id.* at 48a. The court pointed out that enforcement of the ban against petitioners would merely prohibit them "from disseminating advertisements of something the public already knows from experience and from reading [out-of-state] newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices." *Id.* at 45a. The court also concluded that the ban was contrary to the Court's holding in *Central Hudson* because there existed alternative measures, such as educational programs, that could combat alcohol abuse more directly and effectively without infringement on First Amendment interests. *Id.* at 48a-49a.

Finally, the court found that enforcement of the Oklahoma laws against petitioners would effectively preclude them from carrying any out-of-state broadcast signals, since they are prevented by federal law from deleting the commercials, *id.* at 38a, and since "there exists no feasible way for [the operators] to block out the advertisements." *Id.* at 41a.[14]

The Decision Below

On appeal, the Tenth Circuit reversed, holding that enforcement of the Oklahoma liquor advertising ban against petitioners did not violate the First Amendment.[15]

The court of appeals concurred with the district court's conclusion that the wine advertisements carried by the cable operators concerned lawful activity, were

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[14] The court did not reach petitioners' other constitutional claims. App. G at 39a-40a.

[15] Petitioners' other constitutional claims were not addressed by the court of appeals. 699 F.2d at 493 n.1, App. A at 5a.

At the same time and with the same opinion, the court also reversed the district court's judgment for the broadcast plaintiffs in *Oklahoma Telecasters Association v. Crisp*, No. 82-1058, which had been consolidated with the cable operators' case for purposes of appeal.

not false or misleading, and therefore were "protected speech under the First Amendment." 699 F.2d at 500, App. A at 20a. Nevertheless, the Tenth Circuit sustained the ban, holding that this result was compelled by this Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S.Ct. 31 (1982), decided after the district court's decision. *Queensgate* involved an appeal from a decision by the Ohio Supreme Court [16] that sustained as constitutional that state's partial ban on off-premises advertising of liquor prices by certain holders of liquor permits. Although the Tenth Circuit recognized that the Oklahoma restrictions "are indeed broader than the regulation in *Queensgate*," 699 F.2d at 497, App. A at 15a, it concluded that this Court's dismissal of the *Queensgate* appeal "mandate[d]" reversal of the district court decision. 699 F.2d at 502, App. A at 24a.

In addition to relying on *Queensgate*, the Tenth Circuit held that the Oklahoma ban should be sustained because of "the additional deference owed to the legislature as a result of the Twenty-first Amendment." 699 F.2d at 501, App. A at 22a. The court therefore did not require the state to justify its infringement of First Amendment rights by the usual stringent standard and upheld the Oklahoma restrictions after finding them "reasonably related to reducing the sale and consumption of [alcoholic] beverages and their attendant problems," 699 F.2d at 501, App. A at 22a, and "no more extensive than is necessary to serve Oklahoma's asserted interest." 699 F.2d at 502, App. A at 24a.

Although the court noted that cable television operators were precluded by federal law from deleting out-of-state wine commercials from the programming they carry, 699 F.2d at 492, App. A at 4a, and that they "especially are placed in a difficult position" by the liquor advertising ban, 699 F.2d at 502, App. A at 23a,

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[16] *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio 1982).

the court did not explain how the state, consistent with the First Amendment, could effectively prohibit the carriage of out-of-state programming. Nor did the court indicate how cable programming could be distinguished in this respect from magazines and newspapers, which may be distributed in Oklahoma even though they contain liquor advertisements.

On March 21, 1983, the Tenth Circuit denied a petition for rehearing, Appendix B, and on April 4, 1983, under Rule 41(b) of the Federal Rules of Appellate Procedure, the court stayed its mandate for 30 days pending the filing of this petition. Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents important First Amendment issues meriting this Court's review. The Tenth Circuit's decision, if not reversed, would permit the kind of sweeping ban on commercial speech that decisions of this Court have repeatedly condemned. The decision would also countenance an unprecedented state restriction on the press and on the interstate flow of information and ideas since the regulation at issue would effectively prevent cable television operators from carrying out-of-state advertiser-supported programming into Oklahoma.

I. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE PROTECTION OF COMMERCIAL SPEECH IN CONFLICT WITH DECISIONS OF THIS COURT AND CONTRARY TO THE OPINION OF ANOTHER CIRCUIT.

A. The Decision of the Court Below Upholds a Sweeping Ban On Truthful Advertising of a Lawful Product in Conflict With Decisions of This Court.

In upholding Oklahoma's ban on the advertising of alcoholic beverages, the decision below is in direct conflict with decisions of this Court holding that the First

Amendment bars states from prohibiting the dissemination of truthful, non-misleading information about a lawful product.[17]

While at one time decisions of this Court suggested that commercial speech was not constitutionally protected,[18] the Court has repeatedly held over the last decade that truthful advertising related to lawful products and activities is protected by the First Amendment.[19] It has emphasized the societal benefits in preserving a free flow of commercial information about goods and services, and has forcefully repudiated the "paternalistic" approach,[20] adopted below by the Tenth Circuit, that would permit states to protect their citizens against perceived dangers of lawfully available products by banning the dissemination of information about those products.[21]

Contrary to the decision below, this Court in recent years "has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 n.9 (1980). It has struck down as unconstitutional prohibitions on advertising by lawyers, *Bates v. State Bar of*

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[17] *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 570-72 (1980); *id.* at 573-79 (Blackmun, J., concurring in judgment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Carey v. Population Services International*, 431 U.S. 678, 700-02 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[18] *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1932).

[19] *See, e.g., In re R.M.J.*, 455 U.S. 191, 199 (1982).

[20] *Virginia State Board of Pharmacy*, 425 U.S. at 770.

[21] *See Central Hudson*, 447 U.S. at 561; *Bates*, 433 U.S. at 364; *Virginia State Board of Pharmacy*, 425 U.S. at 765.

Arizona, 433 U.S. 350 (1977);[22] on price advertising by pharmacists, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); on the advertising of abortion services, *Bigelow v. Virginia*, 421 U.S. 807 (1975); on the advertising of contraceptives, *Carey v. Population Services International*, 431 U.S. 678 (1977); and on promotional advertising by utilities, *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557 (1980). As stated most recently in the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 450 U.S. 490, 505 (1981):

> "A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients."[23]

The restriction on commercial speech upheld by the Tenth Circuit is precisely the sort of restriction this Court has repeatedly condemned. Oklahoma's liquor advertising ban is plainly not directed, or even claimed to be directed, at commercial speech that is false, deceptive or misleading.[24] Nor does the restricted commercial speech promote an unlawful product or activity; the sale and the consumption of liquor and wine are lawful in Oklahoma. The acknowledged purpose of the restriction is to discourage liquor sales and consumption by restricting the flow of commercial information about liquor to the citizens of the state, 699 F.2d at 500, App. A at 20a—in other words, to enforce the kind of "protection based . . .

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[22] *See also In re R.M.J., supra* (holding unconstitutional various restrictions on the content of lawyers' advertising).

[23] *See also Carey v. Population Services, Inc.*, 431 U.S. at 700; *Virginia State Board of Pharmacy*, 425 U.S. at 774.

[24] 699 F.2d at 500 n.8, App. A at 20a n.8. Both the district court and the court of appeals agreed that the specific advertisements at issue here—the out-of-state wine commercials—are truthful and non-misleading. 699 F.2d at 500, App. A at 20a; App. G at 47a.

on public ignorance," *Virginia State Board of Pharmacy*, 425 U.S. at 769, that this Court has forcefully rejected.[25]

This Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), a decision relied on heavily by the Tenth Circuit below, is not to the contrary and is clearly distinguishable from the present case. This Court has emphasized that its summary dispositions should be narrowly interpreted to extend only to "the precise issues presented and necessarily decided . . . [and] should not be understood as breaking new ground." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The Ohio regulation upheld in *Queensgate* forbade certain liquor permit holders from advertising off-premises the price of liquor per drink or per bottle and from comparing their retail prices to those of their competitors. *See Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E. 2d 135, 139 n.1 (Ohio 1982). The permit holders were allowed, however, to advertise in any medium any other information about alcoholic beverages, including prices in the original containers, and manufacturers and distributors of alcoholic beverages were permitted to advertise their products without restriction. This is a far cry from Oklahoma's sweeping ban on liquor advertising, which even the Tenth Circuit recognized to be "indeed broader than

[25] As the district court found, the fostering of public ignorance in this area is contrary to the purposes of the First Amendment. App. G at 49a-50a. By informing consumers of the availability and nature of a lawful product, the wine commercials at issue here aid "the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. at 364. In addition, just as the utility advertising for electrical products protected by this Court in *Central Hudson* could have the effect of promoting energy conservation by offering an alternative to less energy-efficient products, 447 U.S. at 570, so here, by presenting an alternative to hard liquor and spirits, wine commercials can promote moderation in the consumption of alcohol. *See, e.g.*, C. Burck, *Changing Habits in American Drinking*, Fortune, October 1976, at 159-60. The dissemination of such messages serves the interest of an informed public.

the regulation in *Queensgate*." 699 F.2d at 497, App. A. at 15a.[26]

The Tenth Circuit's decision also conflicts with decisions of this Court insofar as it holds that the First Amendment provides lesser protection when a state seeks to restrict liquor advertising under regulatory power conferred by the Twenty-first Amendment. 699 F.2d at 498, 501-02, App. A at 15a-17a, 22a, 24a. This Court has emphasized that the Twenty-first Amendment does not alter the standard of review under the First Amendment or other constitutional provisions protecting individual rights. *See Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4027 n.5 (U.S. December 13, 1982) ("The state may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment"); *Craig v. Boren*, 429 U.S. 190, 209 (1976) (the Twenty-first Amendment "does not alter the application of equal protection standards that otherwise govern this case"); *Wisconsin v. Con-*

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[26] The regulation approved in *Queensgate* involved only a restriction on advertising by the holders of liquor permits, and this Court has made clear that a state's power to impose conditions on the granting of liquor permits is greater than its power generally to regulate First Amendment activity. *See Craig v. Boren*, 429 U.S. 190, 209 (1976); *California v. LaRue*, 409 U.S. 109, 118 (1972) ("The critical fact is that California has not forbidden these performances across the board [but] has merely proscribed [them] to establishments that it licenses to sell liquor by the drink"). *See also New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981). In this case, on the other hand, Oklahoma seeks to enforce its liquor advertising ban directly against the press. This Court held in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), that a ban on advertising "incur[s] more serious First Amendment overtones" when applied against the press rather than the advertiser. *See also Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, 330, *reh'g en banc ordered* (5th Cir. 1983) ("[A]pplication of [an advertising] regulation against liquor licensees raises different constitutional issues than enforcement of a subject matter ban against publishers and broadcasters").

stantineau, 400 U.S. 433, 436 (1971) (state's power to regulate liquor does not relax requirements of procedural due process).[27]

Finally, the decision below conflicts with this Court's assertion in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564, that even a limited restriction on protected commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . [or] if the governmental interest could be served as well by a more limited restriction."[28] The record in this case contains no evidence that liquor advertising, in particular out-of-state commercials for brands of wine, contributes directly to alcohol abuse, or that the suppression of such commercials directly or effectively promotes temperance. App. G at 48a.[29] To the contrary, the district court found that Oklahoma's ban on such advertising serves the state's purposes in at most a remote, indirect and ineffective fashion. App. G at 45a, 48a. The district court also found that Oklahoma had failed to demonstrate the absence of alternative measures that could serve the goal of temperance as directly or effectively as the advertising ban without such adverse impact on First Amendment rights. App. G at 48a-49a.

The Tenth Circuit's decision in this case, if allowed to stand, is likely to have the effect of encouraging other

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[27] *See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980) (Twenty-first Amendment does not "insulate" states from constitutional requirements).

[28] *See also In re R.M.J.*, 455 U.S. at 203.

[29] *See also* D. Pittman, *Primary Prevention of Alcohol Abuse and Alcoholism: An Evaluation of the Control of Consumption Policy* 18 (Social Science Institute of Washington University, 1981) ("[N]o scientific evidence exists that beverage alcohol advertising has any significant impact on the rate of alcohol abuse and alcoholism in American society"); R. Wilkinson, *The Prevention of Drinking Problems* 43-48, 132, 157 (1970).

states to adopt restrictions on the Oklahoma model. The questions presented are thus of substantial importance.

B. The Decision of the Court Below Is Contrary to the Opinion of Another Circuit.

The decision below is directly contrary to a recent opinion of a panel of the Fifth Circuit declaring a similar state ban on liquor advertising to be an unconstitutional infringement on commercial speech.[30] At issue was a Mississippi statute prohibiting liquor advertisements that originated within the state. The Fifth Circuit panel concluded that the statutory ban violated the First Amendment.

In doing so, the panel expressly rejected both the result reached by the Tenth Circuit in this case and the reasoning it employed. The panel found inapplicable the Supreme Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), and specifically rejected the interpretation placed on *Queensgate* by the Tenth Circuit.[31] The panel also concluded, contrary to the Tenth Circuit, that the state's authority under the Twenty-first Amendment did not change the standard of review under the First Amendment.[32] And the panel found that Mississippi's ban on liquor advertising did not effectively promote the state's interest in controlling liquor consumption, relying principally on the fact that liquor commercials continued to enter the state through magazines and newspapers published outside Mississippi and through radio and television signals received directly by Missis-

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[30] *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, *reh'g en banc ordered* (5th Cir. March 11, 1983). *See also Dunagin v. City of Oxford*, 701 F.2d 335, *reh'g en banc ordered* (5th Cir. March 11, 1983) (applying and following *Lamar*).

[31] *See Lamar*, 701 F.2d at 331 n.23.

[32] *Id.* at 329-330.

sippi residents from stations outside the state.[33] A similar situation exists in Oklahoma, as found by the district court in the present case. App. G at 45a, 48a.

There is thus a clear inconsistency between the decision of the Tenth Circuit and the opinion of the Fifth Circuit panel. These important issues warrant review by this Court.[34]

II. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE PROTECTION OF NONCOMMERCIAL SPEECH IN CONFLICT WITH DECISIONS OF THIS COURT.

This case is also important because it is the first case to come before this Court involving the power of the states under the First Amendment to regulate the content of cable television programming. As the number of cable subscribing households has grown from 2.8 million in 1968 to more than 31 million today,[35] state and local governments have increasingly sought to play a role in the

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[33] *Id.* at 332-33. "When a state seeks to impose such a severe ban upon protected commercial speech, it must at least show that its law does some good." *Id.* at 333.

[34] Recognizing that their decisions produced a conflict between the circuits, the Fifth Circuit ordered rehearing en banc. *Lamar*, 701 F.2d at 316; *Dunagin*, 701 F.2d at 336. Under the rules of the Fifth Circuit, the effect of this action was to vacate the panel opinions and judgments. Vacation of the opinions does not necessarily deprive them of persuasive authority, both within the Fifth Circuit and without. *See, e.g., Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 n.16 (D.C. Cir. 1976) (*citing National Broadcasting Co., Inc. v. FCC*, 516 F.2d 1101, *vacated*, 516 F.2d 1180 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976)).

[35] *See Cable & Station Coverage Atlas* 18a (1982); Multichannel News, March 28, 1983, at 3. The current figure represents more than 37 percent of the nation's television households. *Id.*

regulation of cable program content. Such regulation raises vital First Amendment questions deeply affecting this increasingly important medium of communication.

The regulation at issue here would impose a particularly grave burden on the First Amendment rights of cable television operators and subscribers. The record in this case shows, and both the district court and the court of appeals found, that prohibition of petitioners' carriage of out-of-state wine commercials will effectively preclude petitioners from distributing not only those commercials, but the entire programming of out-of-state television signals, including news programs, editorials, documentaries, entertainment, and other expressions of ideas and information.[36]

As discussed above, the carriage of such programming will be effectively foreclosed because petitioners are prevented by federal law and by overwhelming technical and economic obstacles from deleting the wine commercials that are contained in the programming.[37] It is for these reasons that the district court found that petitioners' only "feasible" alternative, App. G at 39a, would be to drop entirely their carriage of out-of-state broadcast television programming. In fact, for some cable operators the only feasible alternative will be to cease operations entirely, since failure to carry out-of-state television signals will place them in violation of the Federal Communications Commission's "must-carry" rules. 47 C.F.R. § 76.57-.61. Other systems, no longer able to offer out-of-state broadcast signals, will lose subscriptions as a result and suffer severe, in some cases fatal, economic losses. App. G at 42a; II R. 34-35.[38] Although it does not appear in the

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[36] 699 F.2d at 492, App. A at 4a; App. G at 41a.

[37] *See* pages 5-6, *supra*.

[38] The state's imposition of such a debilitating economic burden on cable operators in itself raises important First Amendment

record, petitioners would also be effectively compelled to cease carrying national cable programming services containing wine commercials, such as the Cable News Network and the USA Network.[39]

There can be no doubt that cable television—like newspapers, broadcast television, and motion pictures[40]—is today "a significant medium for the communication of ideas . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02

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concerns. *Compare Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), in which this Court upheld municipal regulations on the format of a newspaper's advertising columns only after determining that the regulations did not "threate[n] [appellant's] financial viability, . . . impai[r] in any significant way its ability to publish and distribute its newspaper," or "endanger arguably protected speech." *Id.* at 383, 390. Such threats to critical First Amendment interests are plainly posed here. *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), in which this Court held that a state tax on the advertising revenue of newspapers having a circulation of 20,000 or more violated the First Amendment because of its tendency "to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *And see Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 51 U.S.L.W. 4315 (U.S. March 29, 1983) (state tax on publications' use of paper and ink violates First Amendment).

[39] While deletion of commercials from such national cable programming services would not violate federal law, it would be in violation of the cable operator's contract with the service provider, which customarily prohibits the removal of advertising. The providers of such programming also typically do not provide cable operators with prior notice concerning the scheduling and nature of commercials, so that the technical and economic impracticality of attempting to delete the commercials is the same as in the case of broadcast television signals. *See* pages 5-6, *supra*.

[40] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper publishers); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (broadcasters); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures).

(1952). Courts which have reached the issue have recognized that the First Amendment protects both the programming carried by cable operators and the operators' editorial function in selecting that programming. *See, e.g., Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).[41] While this Court has not explicitly addressed the question of cable operators' First Amendment status, it has recognized that cable operators exercise editorial discretion in choosing signals and services. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 410 (1974) (choice of broadcast signals by cable operators is a "creative function").

In exempting out-of-state publications from its liquor advertising ban, the state of Oklahoma has apparently recognized that it could not forbid the sale of the New York Times and the Wall Street Journal within the state because they contain wine advertising. Yet Oklahoma seeks to enforce a similar ban against cable operators who—like the Oklahoma distributors of the New York Times and the Wall Street Journal—must either offer the communication in its entirety, including wine advertisements, or forgo its distribution. Such regulation restricting the flow of information into the state is no less unconstitutional applied to cable operators than it would be if applied to newspaper distributors.

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[41] *See also Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981), *petition for cert. dismissed by agreement*, 102 S. Ct. 2287 (1982). *And see* Comment, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 Cal. L. Rev. 1393 (1982); Note, *FCC Regulation of Cable Television Content*, 31 Rutgers L. Rev. 238 (1978); Note, *Cable Television and the First Amendment*, 71 Colum. L. Rev. 1008 (1971).

It is the fundamental purpose of the First Amendment, as applied to the states through the Fourteenth Amendment, to protect from governmental interference the national "free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). To this end, the amendment is designed to ensure that information may flow freely across the country and that ideas originating in New York and New England may be made available to the citizens of Oklahoma and Mississippi. For an individual state to ban entirely an out-of-state communication because it contains objectionable advertising, when that advertising is neither misleading nor designed to encourage the consumption of an unlawful product, strikes at the very heart of the national commerce in ideas. No state, consistent with the First Amendment, may erect such barriers to the free flow of ideas or so "shield its citizens from information about activities outside [its] borders." *Bigelow v. Virginia*, 421 U.S. at 827-28.[42]

That the Oklahoma ban does not expressly forbid—and is not intended to forbid—the importation of all out-of-state signals does not rescue the regulation when so substantial an "effect on the exercise of First Amendment rights arises . . . as an unintended but inevitable result of the government's conduct." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (per curiam). *See also Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment

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[42] *See also Board of Education v. Pico*, 50 U.S.L.W. 4831, 4835 (U.S. June 25, 1982) ("'[A] State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge'") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

rights") (emphasis added); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).[43]

Nor is the regulation saved because it is directed at commercial speech, even if the advertising in question were itself unprotected by the First Amendment.[44] The decision below is directly contrary to decisions of this Court holding that a state may not prevent the dissemination of protected speech on the ground that it includes some suppressible commercial material or activity. Thus, in *Jamison v. Texas*, 318 U.S. 413 (1943), the Court reversed the conviction of a Jehovah's Witness for distributing religious handbills that included an advertisement for a religious publication. Noting that states then could generally "prohibit the use of the streets for the distribution of purely commercial leaflets," *id.* at 417, the Court nevertheless held that "[t]he mere presence of an advertisement" on a handbill furthering religious activity "may not subject the distribution of the handbill to prohibition." *Id.* at 416.[45] In *In re Primus*, 436 U.S. 412

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[43] This Court has repeatedly struck down regulations that substantially restricted important avenues or media of expression, notwithstanding that the purpose of the regulation was unrelated to the content of the speech. *See, e.g., Saia v. New York*, 334 U.S. 558 (1948) (sound trucks); *Martin v. City of Struthers, supra* (door-to-door solicitation); *Schneider v. State*, 308 U.S. 147 (1939) (leafletting). *See also* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1335-36 (1970) ("The state is obligated to protect the channels of communication, even if it takes a special exception and some sacrifice of the state's expression-unconnected interest"). And the Court has viewed with particular alarm regulations that would have the effect, if not the aim, of curtailing the press' ability freely to disseminate information of its choosing. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[44] *But see* Section I, *supra*.

[45] *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943). *Compare Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which this

[Footnote continued]

(1978), the Court held that a ban on in-person solicitation by lawyers—generally a permissible restraint on commercial speech [46]—could not be applied to solicitation by a lawyer for the American Civil Liberties Union because it threatened the effectiveness of the ACLU "as a vehicle for effective political expression and association," *id.* at 431, and thus implicated not only commercial speech but also "core First Amendment rights." *Id.*[47]

If allowed to stand, the Tenth Circuit's decision in this case will permit the state of Oklahoma to severely abridge First Amendment rights by restricting the flow of ideas and information into the state and by curtailing the ability of cable operators to select the programming they carry. The case is of great importance to the future of cable television, an increasingly vital medium in the dissemination of news and information in this country. And here, as in *Bigelow v. Virginia*, 421 U.S. 809 (1975):

> "If application of this statute were upheld under these circumstances, [the state] might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one [at issue] . . . .

Court held that a distributor of handbills composed primarily of commercial advertising could not escape a municipal ban on commercial leafletting by affixing a civic protest to the advertising "with the intent, and for the purpose, of evading the prohibition." *Id.* at 55. There can, of course, be no suggestion in this case that the cable operators carry protected programming in addition to wine commercials in an effort to avoid Oklahoma's ban on liquor advertising.

[46] *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[47] Similarly, this Court has struck down state regulations aimed at unprotected obscenity or libel when their impact would extend more broadly to restrict the dissemination of protected ideas. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964); *Smith v. California*, 361 U.S. 147, 151 (1959); *Stanley v. Georgia*, 394 U.S. 557 (1969). *See also Butler v. Michigan*, 352 U.S. 380 (1957).

Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning." *Id.* at 828-29 (footnotes omitted).

These critical questions require review by this Court.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May 3, 1983

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-1058, 82-1061

OKLAHOMA TELECASTERS ASSOCIATION, an unincorporated association; COMBINED COMMUNICATIONS CORPORATION OF OKLAHOMA, INC., an Oklahoma corporation; GRIFFIN TELEVISION, INC., an Oklahoma corporation; KTVY, INC., an Oklahoma corporation; KTUL-TV, INC., an Oklahoma corporation; KOTV, INC., an Oklahoma corporation; SCRIPPS-HOWARD BROADCASTING CO., an Ohio corporation; GOLDEN WEST BROADCASTERS OF OKLAHOMA, INC., an Oklahoma corporation; BLAIR BROADCASTING OF OKLAHOMA, INC., an Oklahoma corporation; EASTERN OKLAHOMA TELEVISION CO., INC., an Oklahoma corporation; SERAPHIM CORP., an Oklahoma corporation; KOKI-TV, an Oklahoma partnership; and TULSA TV 41, a joint venture,

Plaintiffs-Appellees,

v.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,

Defendant-Appellant.

CABLECOM-GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC.,

Plaintiffs-Appellees,

v.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,

Defendant-Appellant.

Jan. 24, 1983

Robert D. Nelon, Oklahoma City, Okl. (Roy J. Davis, L. Gene Gist and Nancy M. Thompson, Oklahoma City, Okl., with him on the brief), of Andrews Davis Legg Bixler Milsten & Murrah, Oklahoma City, Okl., for plaintiffs-appellees Oklahoma Telecasters Ass'n, et al.

Clyde A. Muchmore, Oklahoma City, Okl. (Richard C. Ford, Oklahoma City, Okl., with him on the brief), of Crowe & Dunlevy, Oklahoma City, Okl., for Cablecom-General, Inc. (John D. Matthews, David P. Fleming and J. Christopher Redding of Dow, Lohnes & Albertson, Washington, D.C., for Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc., with them on the brief), in No. 82-1061.

Gary W. Gardenhire, Asst. Atty. Gen., Okl., Oklahoma City, Okl. (Jan Eric Cartwright, Atty. Gen. of Okl., Oklahoma City, Okl.), for defendant-appellant.

Jerry D. Sokolosky, Oklahoma City, Okl., filed an amicus curiae brief for Oklahoma Press Ass'n and Outdoor Advertising Ass'n of Okl.

Larry Derryberry of Derryberry Duncan & Gray, Oklahoma City, Okl., filed an amicus curiae brief for S.A.N.E., Inc.

Bill Allain, Atty. Gen. of Miss., and Peter M. Stockett, Asst. Atty. Gen. of Miss., Jackson, Miss. (W. Timothy Jones and John E. Milner of Brunini, Grantham, Grower & Hewes, Jackson, Miss., of counsel), filed an amicus curiae brief for the State of Miss.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

Richard A. Crisp (Crisp) appeals from two summary judgments declaring that certain provisions of Okla-

homa's constitution and statutes violate the First and Fourteenth Amendments of the United States Constitution. The appeals were consolidated pursuant to Fed.R. App.P. 3(b).

Appellee in No. 82-1058, Oklahoma Telecasters Association (Telecasters), is an unincorporated association of corporations and partnerships engaged in the business of television broadcasting in the State of Oklahoma. Appellees in No. 82-1061 are holders of cable television franchises in the State of Oklahoma and will be referred to as the "cable operators". Appellant, Crisp, is the former director of the Oklahoma Alcoholic Beverage Control Board, an agency charged with primary responsibility for the enforcement of Oklahoma laws regulating the sale and consumption of alcoholic beverages.

The Oklahoma Constitution stringently restricts the advertising of alcoholic beverages:

> It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store."

Okla. Const. art. XXVII, § 5. The Oklahoma Alcoholic Beverage Control Act similarly prohibits the advertising of "alcoholic beverages or the sale of the same within the State of Oklahoma," except by strictly regulated on-premises signs. Okla.Stat. Ann. tit. 37, § 516 (West Supp.1982). That act defines "alcoholic beverage" as "alcohol, spirits, beer, and wine. . . ." Okla.Stat. Ann. tit. 37, § 506(2) (West Supp. 1982). The definition of "beer" only includes beverages "containing more than three and two-tenths percent (3.2%) of alcohol by weight. . . ." Okla.Stat.Ann. tit. 37, § 506(3) (West Supp.1982). Since beer can contain 3.2% alcohol or less, the advertising of beer generally is allowed. The ad-

vertising of wine and other alcoholic beverages within the state, however, is prohibited.

The members of Telecasters rebroadcast network programming that includes advertisements for wine. Although such advertising is lawful where it originates, and in most states where rebroadcast occurs, the members of Telecasters are required to "block out" network advertising of wine. If Telecasters' members fail to do so, or if they solicit or accept advertisements for alcoholic beverages, they are subject to criminal prosecution by complaint of the Alcoholic Beverage Control Board.

The cable operators also are prohibited from soliciting or accepting advertising for alcoholic beverages. For many years, however, the cable operators have been allowed to relay programming from out-of-state television stations that included advertisements for wine. In fact, Federal Communication Commission regulations and federal copyright law prohibit cable operators from altering or modifying the television signals, including advertisements, they relay to subscribers. *See* 17 U.S.C. § 111 (c)(3) (1976) and 47 C.F.R. § 76.55(b) (1981). Despite those federal requirements, the Attorney General of the state of Oklahoma on May 19, 1980, issued an opinion declaring that the prohibitions against alcoholic beverage advertising apply to cable television in the same manner as they apply to broadcast television. Pursuant to that opinion, Crisp notified the cable operators that the wine commercials they had been relaying were illegal, and threatened the operators with criminal prosecution if they continued to relay such commercials.

Telecasters and the cable operators filed separate suits against Crisp, in his official capacity, in the United States District Court for the Western District of Oklahoma. Pursuant to 28 U.S.C. § 2201 (Supp. IV 1980), both plaintiffs asked the court to render a declaratory judgment that Oklahoma's laws, Okla. Const., art. XXVII, § 5, and Okla.Stat.Ann. tit. 37, § 516, *supra*, vio-

lated their rights to free speech, guaranteed by the First and Fourteenth Amendments, and equal protection, guaranteed by the Fourteenth Amendment.[1] In addition, the cable operators requested and received a preliminary injunction, and both plaintiffs sought permanent injunctions, prohibiting Crisp from enforcing the constitutional and statutory prohibitions against them.

Both the cable operators and Telecasters filed motions for summary judgment under Fed.R.Civ.P. 56. Crisp filed motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On December 18, 1981, the district court filed nearly identical memorandum opinions and orders in the two cases, granting Telecasters' and the cable operators' motions for summary judgment, and denying Crisp's motions to dismiss.

In both opinions the district court ruled that the power to regulate liquor granted to the states by the Twenty-first Amendment to the United States Constitution did not override the First Amendment rights of Telecasters and the cable operators. The court then applied the four part analysis the Supreme Court prescribed in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), for determining the validity of the regulation of "commercial speech". That analysis can be summarized as follows: (1) is the commercial speech protected by the First Amendment: that is, does it concern lawful activity and is it not misleading; (2) is the asserted governmental interest substantial; (3) does the regulation directly advance the governmental interest asserted; (4) is the regulation more extensive than

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[1] The equal protection claim was based on the inconsistency between the treatment of the broadcast versus the printed media: newspapers and magazines published outside of Oklahoma, but circulated within the state, are permitted to carry advertisements of alcoholic beverages. The trial court did not reach the issue of equal protection and it is not before us in these appeals.

is necessary to serve the governmental interest? *Id.* at 566, 100 S.Ct. at 2351.

The district court concluded that Oklahoma's laws only indirectly advanced the stated governmental interest in reducing alcohol consumption and its related problems, and were more extensive than necessary to serve that interest. The court therefore entered declaratory judgments stating that enforcement of the advertising does or would violate the plaintiffs' First Amendment rights, as guaranteed by the Fourteenth Amendment. The court also entered permanent injunctions against Crisp, preventing him, or the Alcoholic Beverage Control Board, from enforcing the laws against the plaintiffs.

On January 11, 1982, Crisp timely filed a notice of appeal with this court. On February 10, 1982, the district court entered an order withdrawing its December 18, 1981, opinions, and filed *nunc pro tunc* memorandum opinions in lieu thereof, supplementing and amplifying its views with respect to the granting of summary judgments. The substituted opinions did not alter the court's reasoning or conclusions in any material way; the December and February opinions are nearly identical. Crisp moved to strike the substituted opinions. The district court overruled the motion in *Cablecom*, but entered no order in *Telecasters*.

Crisp then moved the trial court to stay the permanent injunctions pursuant to Fed.R.Civ.P. 62(c). The trial court denied the motion on May 19, 1982. On October 4, 1982, the Supreme Court dismissed for want of a substantial federal question the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). In that case the Ohio Supreme Court had upheld against a First Amendment challenge a state regulation which prohibited retail liquor permit holders from advertising the retail price of alcoholic beverages.

Based on the *Queensgate* dismissal, Crisp on November 4, 1982, again moved the district court to suspend the injunctions under Fed.R.Civ.P. 62(c). The district court was unable to hear the motions prior to November 15, when the appeals were scheduled for oral argument. On November 9, therefore, Crisp applied to this court under Fed.R.App.P. 8(a) for an order suspending the injunctions during the pendency of the appeals. At the commencement of oral argument on November 15, 1982, we denied that application.

In his briefs, Crisp raises numerous contentions of error, including the propriety of the trial court's summary judgments and *nunc pro tunc* opinions, the denial of Crisp's request for a hearing on his motion to stay the injunctions, and the trial court's application of the *Central Hudson* analysis. At oral argument, however, Crisp emphasized the importance of the *Queensgate* dismissal. We agree that the application of that case is the critical issue in this appeal. Thus, we will first address that issue.

I.

In *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), the appellant, Queensgate Investment Co. (Queensgate), was a holder of an Ohio liquor permit who was prosecuted for the violation of certain regulations of the Ohio Liquor Control Commission. The regulations in question prohibited off-premises price advertising by holders of certain liquor permits.[2] The Commission rendered an order

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[2] The regulations provided, in pertinent part:

> No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.
>
> (A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price

suspending Queensgate's license for one week for the violation of the regulation. Queensgate appealed on several grounds, including a contention that the regulation was an unconstitutional restraint on its First Amendment right to engage in commercial speech.

The Ohio Supreme Court applied the analysis articulated in *Central Hudson*, *supra*, and held that the regulation did not violate the First Amendment. The court first held that the speech was protected and that the asserted governmental interest, that of discouraging the excessive consumption of alcoholic beverages, was substantial and was well within the powers granted to the states under the Twenty-first Amendment. The court then held that since it was directed at controlling alcoholic beverages, not speech, the regulation did directly advance the governmental interest. Finally, the court held that the advertising of drink prices and price advantages would encourage the excessive consumption of alcoholic beverages; thus, the prohibition against such advertising was the narrowest method available to prevent such excessive consumption. *Queensgate*, *supra* at 69 Ohio St.2d 365-67, 433 N.E.2d 138.

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or price advantage except within their premises and in a manner not visible from the outside of said premises.

(B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.

Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

Subsequent enactment of law by the 102nd Ohio General Assembly prohibits the advertising of the retail price of beer in any media. See page 6, Section 4301.211 of the Revised Code of Ohio.

Ohio Adm. Code 4301:1-1-44. *See Queensgate*, *supra* at 69 Ohio St.2d 361-62 n. 1, 433 N.E.2d 138.

Queensgate filed a timely appeal in the United States Supreme Court. The only issue it raised there was whether the regulation violated the "First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity." Jurisdictional Statement at I, *Queensgate Investment Co. v. Liquor Control Commission*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45. The Liquor Control Commission filed with the Supreme Court a motion to dismiss the appeal on the ground that the question was so unsubstantial as not to warrant further argument. The basis for the motion was that an advertising prohibition was well within the scope of a state's powers under the Twenty-first Amendment, which permits a state to totally ban the sale of liquor, or otherwise "minimize its evils".

On October 4, 1982, the Supreme Court dismissed the appeal "for want of a substantial federal question."[3] *Queensgate Investment Co. v. Liquor Control Commission*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). Thus, we must now determine what precedential weight to ascribe to that dismissal in deciding the present appeal.

II.

The seminal case on the precedential effect of summary dispositions by the Supreme Court is *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). In that case the Court was faced with the problem of the distinction between its appellate jurisdiction and its certiorari jurisdiction. Under 28 U.S.C. § 1257

[3] The rules of the Supreme Court require a jurisdictional statement which includes "[a] statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Sup.Ct.R. 15(1)(h). Rule 16 allows the appellee to file a motion to dismiss an "appeal from a state court on the ground that it does not present a substantial federal question. . . ." Sup.Ct.R. 16(1)(b).

(2) (1976), final judgments of the highest court of a state may be reviewed by the Supreme Court: "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." Unlike certiorari jurisdiction, which is discretionary, the Court's appellate jurisdiction is mandatory. *Hicks, supra* at 344, 95 S.Ct. at 2289.[4] Thus, when a case comes before it on appeal, the Supreme Court is "not obligated to grant the case plenary consideration . . . but [it is] required to deal with its merits." *Id.*

The Court in *Hicks* therefore ruled that a summary dismissal of an appeal for want of a substantial federal question is a decision on the merits of the case. Such a summary disposition is binding on the lower federal courts, at least where substantially similar issues are presented, until doctrinal developments or direct decisions by the Supreme Court indicate otherwise. *Id.* at 344-45, 95 S.Ct. at 2289-90.

Although the *Hicks* decision has been criticized for a variety of reasons,[5] since that decision the Supreme Court

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[4] *See also* Sup.Ct.R. 17(1) ("A review on a writ of certiorari is not a matter of right, but of judicial discretion . . ."); 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure §§ 4003, 4004 & 4011 (1977).

[5] Mr. Justice Brennan has criticized the rule as giving too much weight to a summary decision made solely on a jurisdictional statement, for a variety of reasons which are not explained in any sort of opinion. *See Sidle v. Majors*, 429 U.S. 945, 97 S.Ct. 366, 50 L.Ed.2d 316 (1976) (Brennan, J., dissenting from denial of certiorari); *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222 (1976) (Brennan, J., dissenting from denial of certiorari). Sitting by designation in the Fourth Circuit, Justice Clark stated that the *Hicks* rule "fl[ew] in the face" of what he perceived to be the Court's actual practice of according similar treatment and precedential weight to appeals from state courts and petitions for certiorari. 526 F.2d 833, 836 (4th Cir. 1975) (Clark, J., concurring), *cert. denied*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1221 (1976).

has consistently stated that summary dispositions—summary affirmances and summary dismissals for want of a substantial federal question—are decisions on the merits and are binding on the lower federal courts.[6] The Court has refined the rule by emphasizing that a summary disposition only upholds the judgment of the lower court; "[i]t does not . . . necessarily reflect [the Court's] agreement with the opinion of the court whose judgment is appealed." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740 (1979); *See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83, 99 S.Ct. 983, 989-90, 49 L.Ed.2d 230 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam).

It has also become clear that while summary dispositions are rulings on the merits, their precedential effect is limited to the precise issues set forth in the jurisdictional statement:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . .

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[6] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499-500, 101 S.Ct. 2882, 2888-2889, 69 L.Ed.2d 800 (1981) (plurality opinion); *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 462, 99 S.Ct. 2388, 2398, 60 L.Ed.2d 1017 (1979); *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9, 99 S.Ct. 1760, 1767 n. 9, 60 L.Ed.2d 297 (1979); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam); *Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 223, 50 L.Ed.2d 227 (1976).

> Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Mandel, supra at 176, 97 S.Ct. at 2240. *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499, 101 S.Ct. 2882, 2887, 69 L.Ed.2d 800 (1981); *Illinois State Board of Elections, supra* 440 U.S. at 182-83, 99 S.Ct. at 989-90; *Yakima Indian Nation, supra* 439 U.S. at 477 n. 20, 99 S.Ct. at 749. Moreover, although lower federal courts are bound by summary dismissals, they carry less precedential weight in the Supreme Court than opinions rendered after plenary consideration by that Court. *Metromedia, supra* 453 U.S. at 500, 101 S.Ct. at 2889; *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9, 99 S.Ct. 1760, 1767 n. 9, 60 L.Ed.2d 297 (1979); *Yakima Indian Nation, supra* 439 U.S. at 477 n. 20, 99 S.Ct. at 749 n. 20; *Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75, 97 S.Ct. 219, 223-224, 50 L.Ed.2d 227 (1976). In fact, "[i]t is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Yakima Indian Nation, supra* 439 U.S. at 477 n. 20, 99 S.Ct. at 749 n. 20. *See, e.g., Caban, supra* 441 U.S. at 390 n. 9, 99 S.Ct. at 1767 n. 9 (the Court gave plenary consideration to an issue presented and summarily dismissed only three years before and reversed itself).

This review of the *Hicks* rule provides some guidance in determining the precedential weight we should give to the summary dismissal of *Queensgate*. To the extent that the same constitutional issues are presented in this case as were presented in *Queensgate*, that decision is binding, though the reasoning of the Ohio Supreme Court may not be. In his concurring opinion in *Mandel*, Mr. Justice Brennan suggested that in determining the reach of a summary dismissal as precedent, a court must: "(a) examine the jurisdictional statement in the earlier case

to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." *Mandel, supra* 432 U.S. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). These guidelines have been used by other courts. *See Socialist Workers Party v. March Fong Eu*, 591 F.2d 1252, 1257-58 (9th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979); *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898, 904-05 (3d Cir. 1980). We consider them to be appropriate here.

III.

The jurisdictional statement in *Queensgate* presented the following question to the Supreme Court:

> Whether Regulation 4301:1-1-44 of the Ohio Liquor Control Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the permit premises, violates the First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.

Jurisdictional Statement at I, *Queensgate*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45. In support of the proposition that the question was a substantial one, the appellant in *Queensgate* argued that the advertising in question was protected commercial speech, that the Twenty-First Amendment did not allow a state to infringe on protected commercial speech, and that the regulation in question was an unconstitutional infringement on its First Amendment rights when analyzed under the four-part *Central Hudson* test.

In the instant case, the issue is substantially similar. In essence, that issue is: is Oklahoma's advertising pro-

hibition an unconstitutional infringement on protected commercial speech? Implicit in that issue, as we believe was implicit in *Queensgate*, is the issue of whether the Twenty-first Amendment in some way enhances a state's authority to regulate commercial speech concerning alcoholic beverages. To be sure, there are factual distinctions between *Queensgate* and the instant case: the regulated parties here are television stations, not liquor permit holders; the laws here prohibit the rebroadcasting of all advertising of alcoholic beverages, except for beer advertising, while the regulation in *Queensgate* prevented only off-premises price advertising; and other minor distinctions. The crucial similarity between the cases, however, is this: in both cases, the state, acting under its powers granted by the Twenty-first Amendment, has chosen to prohibit some, but not all, forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages. We are confident that the constitutional question presented in *Queensgate* and in the present appeals is substantially the same.

The second inquiry is whether there are any nonconstitutional grounds upon which the Supreme Court may have decided *Queensgate*. As noted above, the appellant's jurisdictional statement in *Queensgate*, while minimizing the effect of the Twenty-first Amendment, clearly concentrated on the argument that the regulation there violated its First Amendment rights to commercial speech. In its motion to dismiss for want of a substantial federal question, the Ohio Liquor Control Commission relied solely on the argument that the state was free to regulate liquor advertising as part of its broad Twenty-first Amendment power to regulate liquor and minimize its evils. In our view, *Queensgate* manifestly presented an issue concerning the tension between the First and Twenty-first Amendments. The Supreme Court arguably may have decided the case on nonconstitutional grounds; if so, however, we cannot discern them. It is our view

that the Supreme Court decided Ohio's regulation was not an unconstitutional infringement on the appellant's First Amendment rights. The *Queensgate* dismissal is binding on this court.

IV.

Still, the Supreme Court has warned against courts being so preoccupied with a summary dismissal that they fail "to undertake an independent examination of the merits." *Mandel, supra* 432 U.S. at 177, 97 S.Ct. at 2241. In light of that warning, and because the laws here in question are indeed broader than the regulation in *Queensgate*, we will follow the approach taken by the court in *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979); *i.e.*, *Queensgate* will "caution us" against finding Oklahoma's laws to be unconstitutional, but we must still examine the merits of these appeals. *Id.* at 1125-26. In understanding this examination, we are mindful that *Queensgate* "broke no new ground", and that we cannot reach an opposite conclusion "on the precise issues presented and necessarily decided by" *Queensgate*. *Mandel, supra* 432 U.S. at 176, 97 S.Ct. at 2241.

The crucial question in this case, as it was under our interpretation of *Queensgate*, is whether Oklahoma's prohibition against advertising of alcoholic beverages, as applied to the Appellees, violates their First Amendment rights, as guaranteed by the Fourteenth Amendment. The resolution of this issue involves an examination of the relative interests at stake; that is, we must balance the right of Telecasters and the cable operators to engage in commercial speech against the right of Oklahoma, through its general police powers as enhanced by the Twenty-first Amendment, to regulate commercial speech relating to alcoholic beverages.

The relevant section of the Twenty-first Amendment states: "The transportation or importation into any State Territory, or possession of the United States for delivery

or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., amend. XXI, § 2. While the states have broad authority to regulate alcoholic beverages under their traditional police powers standing alone, *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 27 L.Ed.2d 515 (1971), "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972). Thus, under the Twenty-first Amendment, the states have the power to prohibit totally the sale of liquor within their boundaries, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600, 69 L.Ed.2d 357 (1981) (per curiam); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128 (1939), and the concomitant power to regulate the times, places, and circumstances under which liquor may be sold. *Bellanca, supra*, 452 U.S. at 715, 101 S.Ct. at 2600. Moreover, within the power conferred by the Twenty-first Amendment, a "State may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to means employed." *Ziffrin, supra* 308 U.S. at 138-39, 60 S.Ct. at 167.

On two separate grounds, therefore, we hold that Oklahoma's alcoholic beverage advertising prohibitions are an exercise of authority within that granted by the Twenty-first Amendment. First, the purpose of the advertising here unquestionably is to encourage sales of alcoholic beverages. As such, the advertising could be considered an incident of the sale of liquor which the state may regulate as it regulates sales themselves: "[t]he prohibition against certain forms of advertising is really a prohibition against soliciting of business." *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F.Supp. 90, 96 (S.D.Cal.1935). Alternatively, the laws are justified as one of the means, selected by an exercise of its broad

discretion, by which Oklahoma has chosen to achieve the proper goal of protecting its people against the harms incident to the use of alcoholic beverages. *Ziffrin, supra* 308 U.S. at 138-39, 60 S.Ct. at 167. The latter justification was the one the State of Ohio presented to the Supreme Court in *Queensgate*. Under either analysis, Oklahoma's liquor advertising laws are within its powers under the Twenty-first Amendment. Accordingly, they are entitled to the " 'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment." *Bellanca, supra* 452 U.S. at 718, 101 S.Ct. at 2601 (*quoting California v. LaRue, supra* 409 U.S. at 118, 93 S.Ct. at 397).

V.

The determination that Oklahoma's laws are within its authority under the Twenty-first Amendment, however, does not end our inquiry. The Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 206-09, 97 S.Ct. 451, 461-63, 50 L.Ed.2d 397 (1976); *Wisconsin v. Constantineau, supra* 400 U.S. at 436, 91 S.Ct. at 509 (1971). A state's power under the Twenty-first Amendment must be considered in the light of the other provisions of the Constitution "in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

In this case, then, we must consider the Twenty-first Amendment in the light of the First Amendment. There is no serious dispute that the advertising here in question is commercial speech, entitled to some degree of protection under the First and Fourteenth Amendments.[7]

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[7] Crisp belatedly argues that the advertisements here are "inherently misleading" and therefore properly prohibited. *See In re*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bates v. State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). In interpreting the scope of protection afforded by the First Amendment, however, there is a "common-sense and legal distinction between speech proposing a commercial transaction and other varieties of speech. . . ." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506, 101 S.Ct. 2882, 2891, 69 L.Ed.2d 800 (1981) (plurality opinion). Rather than dilute the First Amendment, the Supreme Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Association*, 436 U.S. 477, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

Our duty here is to determine whether Oklahoma's laws are a permissible regulation of the Appellee's attenuated First Amendment rights. In doing so, we must bear in mind that the Supreme Court allowed substantially similar regulations, despite similar challenges, in *Queensgate*. Nevertheless, in view of the holding in *Craig*

R.M.J., 455 U.S. 191, 202, 102 S.Ct. 929, 937, 71 L.Ed.2d 64; *Friedman v. Rogers*, 440 U.S. 1, 15-16, 99 S.Ct. 887, 897, 59 L.Ed.2d 100 (1979); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462, 98 S.Ct. 1912, 1921, 56 L.Ed.2d 444 (1978). Irrespective of whether that argument is properly before us, it is clear that Oklahoma's laws are not aimed at preventing deceptive or misleading advertising. Indeed, if they were, they would be in danger of being struck down as being more extensive than reasonably necessary. *See, e.g., In re R.M.J., supra* 455 U.S. at 207, 102 S.Ct. at 940. The purpose of Oklahoma's laws is to prevent the excessive consumption of alcohol. For purposes of determining the constitutionality of the laws in that context, we are willing to accept the trial court's finding that the advertising is truthful.

v. Boren, *supra* 429 U.S. at 209, 97 S.Ct. at 463, that the Twenty-first Amendment does not alter the standards otherwise applicable in equal protection cases, we will apply the analysis for determining the validity of regulation of commercial speech articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct 2343, 65 L.Ed.2d 341 (1980).

In *Central Hudson*, the Court reiterated that commercial speech is accorded lesser protection under the Constitution than other forms of constitutionally protected expression. *Central Hudson*, *supra* at 563, 100 S.Ct. at 2350 (*citing Ohralik*, *supra* 436 U.S. at 457, 98 S.Ct. at 1919). According to the Court, the "protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, *supra* 447 U.S. at 563, 100 S.Ct. at 2350. In order to balance those two competing interests, the Court proposed the following four-part analysis:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, *supra* at 566, 100 S.Ct. at 2351.

The threshold presented by the first two steps is easily crossed. In all relevant respects, the commercial speech here in question concerns lawful activity. The sale and consumption of alcoholic beverages, though heavily regu-

lated, is lawful within the State of Oklahoma.[8] Nor, despite Crisp's allegations, are the advertisements inherently misleading.[9] The commercial speech here is protected speech under the First Amendment. *See Virginia Board of Pharmacy, supra.*

The asserted governmental interest of Oklahoma in prohibiting the advertising of alcoholic beverages is to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse. There can be no question that this asserted interest is substantial. Under its general police power, Oklahoma has a legitimate and substantial interest in the health and welfare of its citizens, the safety of its highways, the stability of its families, and the productivity of its work force, all of which are significantly and adversely affected by the abuse of alcohol. Added to this already substantial interest is the power of Oklahoma under the Twenty-

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[8] Crisp argues that some of the advertising displays conduct which would be unlawful in Oklahoma. First, we do not consider it significant that a nationally broadcast advertisement may show conduct, such as drinking wine in public, which is unlawful in Oklahoma. The purpose of the advertisement is to sell wine, which may be done lawfully in Oklahoma, not to encourage public drinking in violation of the laws of Oklahoma. Secondly, if Oklahoma's true purpose were to prevent only such advertising, the laws again are far more extensive than necessary.

[9] *See* footnote 7, *supra*. Indeed, the qualities that Crisp alleges make these wine commercials "inherently misleading"—the commercials tend to project an image of wine drinkers as successful, fun-loving people, without warning of the dangers of alcohol—are present in the advertising of almost any product from automobiles to snack foods. The Supreme Court's concern with "inherently misleading" advertising is directed towards advertising methods which tend to encourage fraud, overreaching, or confusion, such as some forms of lawyer solicitation. *See Ohralik, supra* 436 U.S. at 462, 98 S.Ct. at 1921. As to advertising in general, the Supreme Court has rejected a paternalistic approach in favor of assuming "that people will perceive their own best interests . . ." if the channels of communication are left open. *Virginia State Board of Pharmacy, supra* 425 U.S. at 770, 96 S.Ct. at 1829.

first Amendment to regulate the sale, and the incidents thereof, of alcoholic beverages, and to protect its citizens from the evils incident to alcohol. *See Ziffrin, supra* 308 U.S. at 138-39, 60 S.Ct. at 167. The asserted state interest, therefore, is exceptionally strong.

We must determine whether Oklahoma's laws directly advance its asserted governmental interest. The trial court found that the laws are at best an indirect means of advancing Oklahoma's interest. In particular, the court noted that other means, such as early and continuing education about the dangers of alcohol abuse, were available. In our view, the trial court misconceived the purpose of this inquiry. *Central Hudson* does not require that we determine whether Oklahoma has chosen the best means to advance its interest; rather the inquiry is whether the means chosen by the legislature, however objectionable any court may find them, directly advance the asserted state interest.

In undertaking this inquiry, we note the approach taken by the plurality in *Metromedia* in applying the third part of the *Central Hudson* test: "We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Metromedia, supra* 453 U.S. at 509, 101 S.Ct. at 2893 (footnote omitted). In that case, the appellants argued that there was nothing in the record to show any connection between billboards, which San Diego had essentially prohibited, and traffic safety, one of the asserted governmental interests. The California Supreme Court had held, nevertheless, that as a matter of law the ordinance eliminating billboards was reasonably related to traffic safety. *Id.* at 508, 101 S.Ct. at 2893. The plurality agreed with that holding. *Id.* at 509, 101 S.Ct. at 2893.

In this appeal, the Appellees similarly argue, and the trial court agreed, that the record does not demonstrate that Oklahoma's laws have any direct effect on the consumption of alcohol. In light of the plurality's language in *Metromedia*, however, and particularly in light of the additional deference owed to the legislature as a result of the Twenty-first Amendment, *Bellanca*,[10] *supra*, we hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales. We therefore do not believe that it is constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally. The choice of the Oklahoma legislature, and its people with respect to the constitutional provision, is not unreasonable, and does directly advance Oklahoma's interest in reducing the sale, consumption, and abuse of alcoholic beverages.

The final inquiry under the *Central Hudson* test is whether Oklahoma's laws are more extensive than is necessary to serve its interest. The trial court con-

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[10] The regulations in question in *Bellanca* prevented nude dancing in establishments which sold liquor for on-premises consumption. Despite the fact that the regulation played a different role in New York's alcoholic beverage regulatory scheme than the laws here, we find the following language instructive:

> Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Bellanca, supra 452 U.S. at 718, 101 S.Ct. at 2601.

cluded, and Appellees urge, that since with respect to Telecasters and the cable operators all rebroadcasting of alcoholic beverage advertising was prohibited, the laws were more extensive than necessary.

Again, the plurality opinion in *Metromedia* is instructive. In that case, San Diego's ordinance banned virtually all billboards, allowing only on-site advertising and other limited exceptions. According to the stipulated facts in the case, the result of the ordinance was to eliminate completely the outdoor advertising business in San Diego. *Metromedia, supra* 453 U.S. at 497, 101 S.Ct. at 2887. Nevertheless, noting in particular that on-site advertising and some other signs were specifically exempted from the ordinance, the plurality held that the ordinance was no broader than necessary. *Id.* at 508, 101 S.Ct. at 2893.

We recognize, of course, that the plurality eventually did strike down the ordinance in *Metromedia*. It did so, however, only on the grounds that the ordinance violated the First Amendment protections for political and other noncommercial speech. *Metromedia, supra* at 513-17, 101 S.Ct. at 2895-97. The plurality's analysis clearly distinguished between commercial and non-commercial speech. With respect to the commercial speech aspect of the case, the plurality applied the *Central Hudson* test and found that the ordinance was constitutional. *Metromedia, supra* at 507-09, 512, 101 S.Ct. at 2891-93, 2895.

It is our view, therefore, that Oklahoma's laws also pass the fourth and final test under *Central Hudson*. Even though Appellees are completely prohibited from rebroadcasting alcoholic beverage advertising, they are free to carry other forms of advertising. We recognize that the cable operators especially are placed in a difficult position; however, nothing in the First Amendment prohibits this result. *See Metromedia, supra*. On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising

in out-of-state printed publications distributed in Oklahoma is allowed. Although Appellees bear a disproportionate burden of the regulation, Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages. With particular emphasis on the power of Oklahoma under the Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest. Article XXVII, § 5, of the Oklahoma Constitution, and Section 516 of title 37 of the Oklahoma Statutes, are valid restrictions on commercial speech and do not violate the Appellees' First Amendment rights.

We again emphasize that the *Central Hudson* test is essentially a balancing test. When the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permiting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result. We order that the permanent injunctions be dissolved and we reverse the district court's summary declaratory judgments.

McKAY, Circuit Judge, concurring:

While I fully concur in the court's opinion, I add this concurring statement to bring out an additional serious consequence of the alternative result. The section under attack in these cases was enacted by a vote of the people at large in a single referendum petition that included not only the regulatory scheme but the surrender by repeal of the Prohibition Ordinance, *see* Okla. Const., art. XXVII, §§ 1-11 (1981) (each section composed part of State Question No. 386, Referendum Petition No. 121 which was adopted at election held April 7, 1959), which had stood since statehood as the fundamental law of Oklahoma separately voted on by the people at large. The regulatory package was clearly the quid pro quo for the sur-

rendered after decades of dispute of this long held public standard. I have serious doubt that federal courts are at liberty glibly to sever and strike down one section of such an integrated state decision with its long and turbulent history, *see Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981), *reh'g denied*, 454 U.S. 1165, 102 S.Ct. 1040, 71 L.Ed.2d 322 (1982), without striking down the whole and restoring the status quo ante whether any of the parties would desire such a result.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

No. 82-1061

CABLECOM-GENERAL, INC., COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATION, INC.,

Plaintiffs-Appellees,

vs.

RICHARD A. CRISP, Director,
Alcohol Beverage Control Board,
Defendant-Appellant,

SANE, INC., OKLAHOMA PRESS ASSOCIATION, OUTDOOR ADVERTISING ASSOCIATION OF OKLAHOMA, STATE OF MISSISSIPPI,

Amici Curiae.

This matter comes on for consideration of appellees' petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

Date of Entry: March 21, 1983

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

No. 82-1061

CABLECOM-GENERAL, INC., COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATION, INC.,

Plaintiffs-Appellees,

vs.

RICHARD A. CRISP, Director,
Alcohol Beverage Control Board,
Defendant-Appellant,

SANE, INC., OKLAHOMA PRESS ASSOCIATION, OUTDOOR ADVERTISING ASSOCIATION OF OKLAHOMA, STATE OF MISSISSIPPI,

Amici Curiae.

This matter comes on for consideration of appellees' motion for stay of mandate in the captioned cause pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandate is stayed until May 4, 1983, pending certiorari and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellees have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

Date of Entry: April 4, 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-290-W

CABLECOM-GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Plaintiffs

v.

RICHARD A. CRISP, DIRECTOR,
ALCOHOLIC BEVERAGE CONTROL BOARD,
Defendant.

PRELIMINARY INJUNCTION

This cause came on for hearing on March 6, 1981 on plaintiffs' Motion for Preliminary Injunction. All parties appeared by counsel. The Court, having heard the testimony of the witnesses and argument of counsel, finds as follows:

1. This action is brought against the defendant in his official capacity as the Director of the Alcoholic Beverage Control Board of the State of Oklahoma. Defendant's official duties include investigation of potential violations of Alcoholic Beverage Laws and aiding prosecution of violations. 37 O.S. § 509. Oklahoma's Alcoholic Beverage Laws include a prohibition against advertising alcoholic beverages.

2. Plaintiffs are operators of various cable television systems throughout the State of Oklahoma. As part of their programming, they relay to subscribers the signals of out of state television stations, which signals include commercials advertising alcoholic beverages. They seek a declaration that enforcement of Oklahoma laws pro-

hibiting advertisement of alcoholic beverages against them would violate their rights under the United States Constitution and an injunction prohibiting enforcement against them.

3. Defendant has made known his intention to recommend prosecution of plaintiffs if violations of the advertising prohibition are brought to his attention.

4. Plaintiffs' uncontradicted testimony showed that attempting to comply with the advertising prohibition pending final hearing of this action would entail enormous financial burden and would also, in many instances, place them in violation of United States law.

5. In some instances, the signals containing the alcoholic beverage advertisements have been carried by cable systems in the state for over ten years, without previous challenge.

6. Plaintiffs are faced with a genuine threat that the advertising prohibition will be enforced against them, giving this Court jurisdiction to entertain this action.

7. Plaintiffs have demonstrated the probability that they would suffer irreparable injury if defendant is not enjoined from pursuing enforcement pending final hearing of this action.

8. Plaintiffs have demonstrated a sufficient probability of success to justify preliminary relief preserving the status quo, particularly in light of the absence of any showing of injury to defendant from the granting of such relief.

IT IS THEREFORE ORDERED, that defendant, in his official capacity, his agents, employees, attorneys, and all persons in active concert or participation with him are hereby enjoined pending determination of this action from attempting to enforce or assisting or recommending any attempted enforcement of Oklahoma law

prohibiting advertisement of alcoholic beverages against these plaintiffs.

LEE R. WEST
United States District Judge

Date of Entry: March 19, 1981

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-290-W

CABLE-COM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATION, INC.,

Plaintiffs,

vs.

RICHARD A. CRISP, Director, Alcoholic Beverage Control Board,

Defendant.

DECLARATORY JUDGMENT

Pursuant to 28 U.S.C. § 2201, and in accordance with the Memorandum Opinion entered herein this 18th day of December, 1981,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that enforcement of Article 27, § 5, of the Oklahoma Constitution or 37 O.S. (1971) § 516 by the defendant, in his official capacity, his agents, employees, attorneys, and all persons in active concert or participation with him, against the plaintiffs is or would be a violation of Plaintiffs' First Amendment rights under the United States Constitution as guaranteed to the states by the Fourteenth Amendment.

IT IS SO ORDERED this 18th day of December, 1981.

/s/ Lee R. West
United States District Judge

Date of Entry: December 18, 1981

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-290-W

CABLE-COM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATION, INC.,

Plaintiffs,

vs.

RICHARD A. CRISP, Director, Alcoholic Beverage Control Board,

Defendant.

PERMANENT INJUNCTION

In accordance with the Memorandum Opinion and Order entered herein this 18th day of December, 1981,

IT IS HEREBY ORDERED that Defendant, in his official capacity, his agents employees, attorneys, and all persons in active concert or participation with him, are permanently enjoined from attempting to enforce or assisting or recommending any attempted enforcement of Article 27, § 5, of the Oklahoma Constitution or 37 O.S. (1971) § 516 against these plaintiffs.

IT IS SO ORDERED this 18th day of December, 1981.

/s/ Lee R. West
United States District Judge

Date of Entry: December 18, 1981

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-290-W

CABLE-COM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATION, INC.,

Plaintiffs,

vs.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,

Defendant.

Richard C. Ford and Clyde A. Muchmore, 1800 Mid-America Tower, Oklahoma City, OK 73102, and Arthur H. Harding, FLEISHMAN AND WALSH, 1725 N Street, N.W., Washington, D.C. 20036 for the plaintiff Cable-Com General, Inc.

Marvin B. York and John W. Maile, BLEVINS & YORK, 1245 S.W. 44th St., Oklahoma City, OK 73109, and David P. Fleming of DOW, LOHNES & ALBERTSON, 1225 Connecticut Ave., Washington, D.C. 20036 for the plaintiff Cox Cable of Oklahoma City, Inc.

Robert Jernigan, 1200 N. Shartel, Oklahoma City, OK 73101, and David P. Fleming of DOW, LOHNES & ALBERTSON, 1225 Connecticut Ave., Washington, D.C. 20036 for the plaintiff Multimedia Cablevision, Inc.

Jap W. Blankenship and Warren F. Bickford of FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, 2400 First National Center, Oklahoma City, OK 73102 and David P. Fleming of DOW, LOHNES & ALBERTSON, 1225 Connecticut Ave., Washington, D.C. 20036 for the plaintiff Sammons Communication, Inc.

Jan Eric Cartwright, Attorney General, and Michael C. Conaway, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, OK 73105 for Defendant.

Jerry D. Sokolosky, 514 Park Harvey Center, 200 North Harvey, Oklahoma City, OK 73102 for Amicus Curiae Oklahoma Press Association.

Larry Derryberry of DERRYBERRY, DUNCAN & NANCE, 4420 North Lincoln Boulevard, Oklahoma City, OK 73105 for Amicus Curiae S.A.N.E., Inc.

MEMORANDUM OPINION AND ORDER

Before the Honorable Lee R. West, United States District Judge.

Introduction

Plaintiffs are corporations qualified to do business in Oklahoma and are holders of cable television franchises in the state of Oklahoma. They have franchises throughout the state including operations in Canadian, Ottawa, Oklahoma, Tulsa, Kiowa, Greer, and Noble Counties. Plaintiffs relay to paid subscribers the signals of various television stations, some of which originate outside Oklahoma.

Defendant is the Director and Secretary to the Board of the Alcoholic Beverage Control Board, an agency of the State of Oklahoma charged with primary responsibility for the enforcement of Oklahoma law relating to alcoholic beverages. Director Crisp is sued only in his official capacity.

Some of the programming which Plaintiffs relay to their customers includes advertisements for wine, an alcoholic beverage as defined in Article 27, § 5 of the Oklahoma Constitution, and 37 O.S. § 506 (1971). This advertising is lawful where originated but prohibited in

Oklahoma. Plaintiffs seek a declaratory judgment that, as applied to Plaintiffs, the provisions of Oklahoma's Constitution and laws prohibiting advertisement of alcoholic beverages violate Plaintiffs' constitutional rights. The case was filed on March 3, 1981, and on March 6, 1981, following an evidentiary hearing, the Court preliminarily enjoined Defendant from attempting to enforce the challenged provisions against Plaintiffs during the pendency of this action. That injunction remains in force and Plaintiffs seek to have it made permanent to prohibit Defendant from attempting to enforce or assisting any attempted enforcement as threatened against Plaintiffs.

Plaintiffs have moved for summary judgment pursuant to Rule 56, F.R.Civ.P., on the grounds that the constitutional and statutory ban on advertising violates the plaintiffs' First Amendment right to freedom of speech. Plaintiffs also contend the ban is a violation of Plaintiffs' right to equal protection under the law. The Oklahoma Press Association has filed an amicus curiae brief in support of Plaintiffs' Motion for Summary Judgment.

Defendant has filed a Motion to Dismiss pursuant to Rule 12(b)(6), F.R.Civ.P. Defendant contends that because the Twenty-first Amendment grants a broad sweep of power to Defendant to regulate the liquor industry, the passage of Okla. Const., art. 27, § 5 and the enactment of 37 O.S. § 516 (1971) do not violate the freedom of speech protection of the First Amendment. Defendant further contends that no equal protection violation is manifest in the laws in question because they bear a rational relationship to the legitimate governmental goal of protecting the health, safety, and welfare of the people of Oklahoma. Defendant contends that quasi-judicial and prosecutorial immunity of Richard A. Crisp bars a claim under 42 U.S.C. § 1983. S.A.N.E., Inc., has filed an amicus curiae brief in support of Defendant's Motion to Dismiss.

District Court Jurisdiction

The plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 42 U.S.C. § 1983. Defendant in its answer denies jurisdiction, claiming that the Court should abstain because no federal question is presented and because the Supreme Court of Oklahoma has ruled upon the questions presented here and has declared the constitutional provisions and statute in question to be constitutionally valid.

Defendant does not address these jurisdictional issues in its brief in support of its Motion to Dismiss other than to assert that Defendant is immune from suit pursuant to 42 U.S.C. § 1983 because of the doctrine of quasi-judicial and prosecutorial immunity. Nevertheless, the Court is aware of Defendant's position and authorities from contentions in other briefs and oral arguments presented to the Court. Accordingly, the Court has considered the threshold issue of jurisdiction.

Title 28 U.S.C. § 1343 provides in relevant part:

> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation under color of any . . . statute, ordinance . . . of any right, privilege or immunity secured by the Constitution of the United States, ...
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance . . . of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or im-

> munities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The doctrine of quasi-judicial or prosecutorial immunity might be relevant if this were a suit for damages pursuant to 42 U.S.C. § 1983; however, Defendant cites no authority in support of application of the doctrine to a suit such as this one for declaratory or injunctive relief. Neither section 1983 itself nor the Eleventh Amendment presents a bar to a suit for prospective injunctive relief against a state official acting in his official capacity. See, *Acha v. Beame*, 438 F. Supp. 70, 77 (S.D. N.Y. 1977), *aff'd*, 570 F.2d 57 (1978), and cases cited therein.

The federal court has a duty to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. *Zwickler v. Koota*, 389 U.S. 241 (1967).

The Court is not called upon to give relief that may relate in any way to a pending state criminal proceeding. Accordingly, the type of abstention called for by *Younger v. Harris*, 401 U.S. 37 (1971), would not be appropriate. Neither is the Court dealing with an ambiguous state statute which might require abstention under the Pullman Doctrine. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). See generally, Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction § 4242 at 456.

Furthermore, the issues before this Court have not been decided by the Oklahoma Supreme Court. In *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines International*, 566 P.2d 1158 (Okla. 1977), the Oklahoma Supreme Court held that Oklahoma's prohibition on the advertisement of alcoholic beverages did not violate the Commerce Clause. In *Oklahoma Alcoholic Beverage Control Board v. Burris*, 626 P.2d 1316

(1980), the Oklahoma Supreme Court held that the First Amendment rights of a retail seller of alcoholic beverages were not violated by Oklahoma's laws with respect to liquor advertising. Retail sellers are permitted to place a sign outside their retail outlets and are permitted to advertise in the Yellow Pages of the telephone directory. Those cases are distinguishable from this case where Plaintiffs are prohibited from rebroadcasting alcoholic beverage advertisements which originate outside Oklahoma.

The plaintiffs in this case have demonstrated a genuine threat of enforcement of the constitutionally contested laws and the Court finds that it has jurisdiction of the case pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343, and 2201.

Motion for Summary Judgment
Motion to Dismiss

The standard for consideration of cross-motions was recently reiterated in *Harrison Western Corporation v. Gulf Oil Co.*, 662 F.2d 690 (1981) at 691:

> We are fully aware of the fundamental principle that summary judgment is not to be granted unless the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Coyce v. Carter Oil Co.*, 618 F.2d 669, 672 (10th Cir. 1980); Rule 56(c), F.R.Civ.P. It is also settled doctrine that the fact that both parties have moved for summary judgment does not permit the entry of a summary judgment if disputes remain as to material facts. *Buell Cabinet Co., Inc. v. Sudduth*, 608 F.2d 431 (10th Cir. 1979); *Securities and Exchange Commission v. American Commodity Exchange, Inc.*, 546 F.2d 1361 (10th Cir. 1976); *Rains v. Cascade*

Industries, Inc., 402 F.2d 241 (3rd Cir. 1968). However, cross motions for summary judgment do authorize the Court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties. *Securities & Exchange Commission v. American Commodity Exchange, Inc., supra; H. B. Zachry Co. v. O'Brien*, 378 F.2d 423 (10th Cir. 1967).

Cross-motions have been filed by the parties. In this case the Court is not only legally authorized to assume that there is no evidence which needs to be considered other than that which has been presented by the parties (*Securities & Exchange Commission v. American Commodity Exchange, Inc., supra*), but the parties have assured the Court both in pretrial conference and in their briefs that irrespective of any factual disputes with respect to other issues in the case, there are no genuine issues of material fact with respect to the issues raised by the motions before the Court. Neither side wishes further evidentiary hearing, and the Court is asked by both parties to decide as a matter of law whether upon the undisputed facts before the Court, Plaintiffs' constitutional rights are violated because they are prohibited by Oklahoma law from relaying broadcasts originating outside Oklahoma which advertise alcoholic beverages.

The Court has given careful consideration to the well reasoned arguments of both parties, to the amicus curiae briefs on behalf of each side to the dispute, and to the legal authorities cited in support of the various contentions. Careful analysis of the pertinent legal authorities demonstrates conclusively that the laws in question, as applied to Plaintiffs, are violative of Plaintiffs' First Amendment rights and that Plaintiffs are entitled to the declaratory and injunctive relief they seek. Because the laws are unconstitutional as applied to Plaintiffs, the Court need not consider whether the laws are un-

constitutional on their face and/or whether they are unconstitutional on equal protection grounds.

The following facts which are material to the issue before the Court are uncontroverted:

1. Plaintiffs are corporations, duly qualified to do business in the state of Oklahoma. Plaintiffs are the holders of cable television franchises in the state of Oklahoma. Plaintiffs have franchises throughout the state including operations in at least the following counties: Canadian, Cleveland, Grady, Logan, Kay, McCurtain, Jackson, Carter, Ottawa, Oklahoma, Tulsa, Kiowa, Greer, and Noble. Many aspects of Plaintiffs' operations are conducted under regulations issued by the Federal Communications Commission under the Federal Communications Act of 1934, 47 U.S.C. §§ 151 et seq.

2. Defendant is the Director and Secretary to the Board of the Alcoholic Beverage Control Board, an agency of the State of Oklahoma charged with primary responsibility for the enforcement of Oklahoma law relating to alcoholic beverages, and is sued here solely in his official capacity.

3. As part of their lawful service to subscribers, Plaintiffs relay to the subscribers the signals of various television stations, some of which originate outside the state of Oklahoma.

4. Plaintiffs have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations.

5. Plaintiffs are prohibited by FCC regulations having the force of law and by the Copyright Act, 17 U.S.C. § 111(c)(3), from altering or modifying the signals of the stations they carry, except as expressly permitted by such regulations. 47 C.F.R. § 76.55(b).

6. For many years and continuing to the present, some of the programming relayed to Plaintiffs' customers has included advertisements for wine, an alcoholic beverage as defined in Article 27, § 5 of the Oklahoma Constitution, and 37 O.S. § 506.

7. Said advertising is lawful where originated, and no provision of federal regulations authorizes Plaintiffs to delete it from the signals relayed to Plaintiffs' customers.

8. Advertisement of alcoholic beverages within the state of Oklahoma is prohibited by Art. 27, § 5 of the Oklahoma Constitution and 37 O.S. § 516.

9. In *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines International, supra*, the Oklahoma Supreme Court held the Commerce Clause did not prohibit the ban and that the constitutional and statutory advertising prohibitions required broadcast television stations to block out wine advertising in programming delivered to them by the networks. The ban was not challenged on First Amendment grounds.

10. On May 19, 1980, the Attorney General of the State of Oklahoma issued an Opinion declaring that the prohibitions on alcoholic beverage advertising applicable to broadcast television apply similarly to cable television.

11. Defendant has threatened cable television operators in the state of Oklahoma, including Plaintiffs, with criminal prosecution if they continue to carry programming containing alcoholic beverage advertising. Defendant's actions have included letters to all cable operators notifying them of the alleged illegality of the wine commercials as well as express oral and written threats of imminent prosecution.

12. There exists no feasible way for Plaintiffs to block out the advertisements.

13. Failure to carry the out-of-state stations containing wine commercials would place Plaintiffs in violation of their franchises and would probably cause a large but inherently immeasurable reduction in Plaintiffs' subscriber revenue.

14. The stated purpose of the advertising ban is to reduce consumption of alcoholic beverages.

15. Consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages.

16. The sale, purchase, and consumption of alcoholic beverages is, subject to certain limitations not material to this action, lawful in Oklahoma.

The State of Oklahoma can, under the Twenty-first Amendment, totally prohibit the sale of alcoholic beverages within the state of Oklahoma. The question before the Court is whether having legalized the sale of alcoholic beverages, the State can totally prohibit advertising of alcoholic beverages except for one sign at the retail outlet and a listing of wholesalers and retailers of alcoholic beverages in the Yellow Pages of the telephone directory.

There is no question that Plaintiffs have a speech interest protected by the First Amendment to the United States Constitution. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

The Supreme Court traced the recent development in the protection of commercial speech in *Metromedia, Inc. v. City of San Diego*, 49 U.S.L.W. 4925 (1980), as follows:

> The extension of First Amendment protection to purely commercial speech is a relatively recent development in First Amendment jurisprudence. Prior to 1975, purely commercial advertisements and services or goods for sale were considered to be outside the protection of the First Amendment. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). That construction of the First Amendment was severely cut back in *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection: A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

49 U.S.L.W. at 4929.

In applying the First Amendment to commercial speech, the Supreme Court rejected the "highly paternalistic" approach that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. Instead, it noted the presence of a potent alternative—"that alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, at 770.

Such commercial expression not only serves the economic interest of the speaker but also assists the consumers and furthers the societal interest in the fullest possible dissemination of information. *Virginia Board of Pharmacy v. Virginia Consumer Council, Inc., supra; Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977).

See also, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977).

Recently, the Supreme Court has found unconstitutional a blanket prohibition of price advertising by pharmacists, a blanket suppression of advertising by attorneys, and a blanket prohibition of advertising carrying information about the availability and price of contraceptives. *Virginia Board of Pharmacy v. Virginia Consumer Council, supra; Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977).

Of course misleading advertising may be prohibited entirely. *Ohralic v. Ohio State Bar Association, supra, Friedman v. Rogers*, 440 U.S. 1 (1979). And even when advertising is not misleading, the State retains some authority to regulate if the restriction is narrowly drawn and the regulation furthers the State's substantial interest. *Central Hudson Gas Co. v. Public Service Commission*, 447 U.S. 557 (1980).

Article 27, § 5 of the Constitution of Oklahoma makes it "unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" The Oklahoma Statutes provide:

> It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store,' or any combination of such words, or any of them, and no letter in any such sign shall be more than four (4) inches in height, or more than three (3) inches in width, and if more than one line is used, the lines shall not be more than one (1) inch apart.

37 O.S. (1971) § 516.

The defendant claims that the Twenty-first Amendment overrides any First and Fourteenth Amendment rights of the plaintiffs.

The Twenty-first Amendment, § 2, provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited. U.S. Const. amend. XXI, § 2.

Defendant relies upon *California v. LaRue*, 409 U.S. 109 (1972), in urging the proposition that any speech which is used in connection with the sale of alcoholic beverages may be proscribed by a state under the broad grant of power to the states by the Twenty-first Amendment.

The circumstances of the present case are distinguishable from *California v. LaRue, supra.* In that case the California Department of Alcoholic Beverage Control regulations prohibited certain sexually explicit live entertainment or films in establishments licensed to sell liquor by the drink. The regulations prohibited the performance of specific acts including sexual intercourse, masturbation, sexual acts prohibited by law, touching or fondling of breasts or genitals, displaying of genitals, or films depicting such prohibited acts. The Supreme Court found that the State's interest outweighed the challenger's First Amendment rights and that the State had chosen a reasonable means to attain its interests since it had not totally prohibited the performances in question but had merely proscribed such performances in establishments licensed to sell liquor by the drink.

In this case, the plaintiffs are prohibited from disseminating advertisements of something the public already knows from experience and from reading newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices.

A careful reading of *California v. LaRue, supra*, reveals that the decision "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.* at 115.

The Supreme Court recently addressed the power of the states under the Twenty-first Amendment in deciding that a California state plan for wine pricing was subject to the federal antitrust laws despite the state's power to regulate importation and transportation of liquor under the Twenty-first Amendment. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). The Supreme Court points out that in determining state powers under the Twenty-first Amendment, the focus has been largely on the language of the provision rather than the history behind it. ". . . Even when the states had acted under the explicit terms of the Amendment the Court resisted the contention that § 2 'freed the states from all restrictions upon the police power to be found in other provisions of the Constitution . . . .'" *Id.* at 108. The Supreme Court states that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment including the equal protection requirements of the Fourteenth Amendment (citing to *Craig v. Boren*, 429 U.S. 190, 204-209 (1976)) and due process requirements (citing to *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)).

The Supreme Court has decided that fundamental constitutional rights such as due process, equal protection, and freedom of speech are not swallowed up by the Twenty-first Amendment. Accordingly, we are required to consider each part of the constitution in light of the other and in the context of the issues and interests at stake in the case before us.

Applying the legal propositions that the State cannot totally prohibit the dissemination of truthful information about a lawful activity; that the State has broad

power under the Twenty-first Amendment to regulate the sale of alcoholic beverages; and that the State retains the authority to regulate advertising if the interference is in proportion to the interests served to the undisputed facts before us, is it constitutional for the State of Oklahoma to totally prohibit the advertising of alcoholic beverages except for one sign at the retail outlet and a listing of outlets in the Yellow Pages of the telephone directory?

The four-part inquiry in *Central Hudson Gas and Electric Corp. v. Public Service Commission, supra,* provides a means of balancing the constitutional rights of the parties. The analysis turns on the nature of the expression sought to be suppressed and the government interests served by the regulation in question.

The test is as follows: First, the expression must be protected by the First Amendment; that is, it must concern lawful activity and not be misleading. Second, the asserted government interest must be substantial. Third, the regulation in question must directly advance the governmental interest asserted; and fourth, the regulation must not be more extensive than is necessary to serve that interest.

In applying the test to this case, first, we are dealing with protected speech because there is no claim that the communications suppressed are either misleading or related to unlawful activity.

Second, the asserted government interest is substantial. Promotion of temperance is the State interest cited in the Opinion of the Attorney General as justification for the ban. Atty.Gen.Op.No. 77-244 (September 19, 1977). Another stated goal of the Oklahoma Alcoholic Beverage Control Act as stated in the briefs is "an exercise of the police power of the State of Oklahoma for the protection of the welfare, health, peace, temperance, and safety of the people of the State . . . ."

The State of Oklahoma has a substantial interest in the health and welfare of its people. The Twenty-first Amendment gives it a substantial amount of control over the sale of alcoholic beverages. The Court recognizes the legitimacy and importance of the State's goals of protecting its citizens. The disease of alcoholism and the deaths and injuries caused by the abuse of alcohol are very real concerns to the people and the government of this state.

Third, the Court finds that under the undisputed facts, the ban on advertising is at best an indirect means of advancing the State's interest in temperance for the following reasons. There is no evidence before the Courts that Oklahoma's ban on advertising is a direct means of preventing alcohol abuse or protecting the health, safety, or welfare of Oklahomans. It is uncontroverted that consumption of alcoholic beverages in Oklahoma has increased substantially in the last twenty years despite the ban on advertising of such beverages. Of course, the argument can be made that an even greater increase would have occurred but for the ban. The realities of the situation are that beer commercials have been permitted despite the ban; wine commercials are heard in Oklahoma on radio broadcasts which originate outside the state; beer, wine, and distilled spirits advertisements in magazines originating outside Oklahoma are permitted. The Court finds it hard to believe that the prohibition of advertising by Oklahoma media is a direct means of achieving temperance.

There are other means available to the State which are more direct means of combating Oklahoma's alcohol abuse problems. Some of these were recommended by the Task Force on Alcohol Abuse after several months of study and interchange on the issue. The highest priority was given to early and continuing education about the biological and psychological effects of alcohol and its potential for personal and social harm. See,

"Alcohol Abuse in Oklahoma," Report and Recommendation of the Task Force on Alcohol Abuse. Such an approach would be in keeping with the Supreme Court's view that the best means to help people to perceive their best interests is to open the channels of communication rather than to close them.

Fourth, the State's attempted regulation is more extensive than necessary to serve the State's interest.

Defendant contends that it is important for the Court to note that Oklahoma has not denied the liquor industry all means of advertising its product, noting that retail liquor establishments are permitted one sign and a listing in the Yellow Pages of the telephone directory.

The plaintiffs in this case, however, are holders of cable television franchises and are totally prohibited from rebroadcasting advertisements for alcoholic beverages which originate in other states. As to these plaintiffs, the regulation is not one of time, place, and manner but is a total prohibition of the dissemination of all information on the subject of alcoholic beverages.

A means less restrictive than blanket suppression has not been tried. For example, the State might appropriately require warnings of health hazards. It is not clear that an absolute prohibition of advertising is the only solution.

Weighing all of the rights and interests involved, the State of Oklahoma has a substantial interest in the health and welfare of its citizens and broad power to regulate the sale of alcoholic beverages under the Twenty-first Amendment. The State has the authority to regulate advertising that is inherently misleading or is misleading in practice. The State's power under the Twenty-first Amendment will likely support carefully drawn restrictions of advertising which are short of a total prohibition of advertising. But Plaintiffs enjoy a substantial degree of First Amendment protection which requires that the

State's regulation of commercial speech, even with the added weight of the Twenty-first Amendment, be carefully drawn to directly further the State's interest and that it be no more extensive than reasonably necessary to further the State's interest. In the absence of any allegations that the prohibited advertising is misleading, the Court finds that a total prohibition of all advertising by the plaintiffs fails to meet these requirements.

Accordingly, Defendant is hereby permanently enjoined from enforcing Article 27, § 5, of the Oklahoma Constitution and 37 O.S. § 516 (1971) against the plaintiffs and a declaratory judgment shall be entered that enforcement of these laws would violate Plaintiffs' rights under the First Amendment as guaranteed to the states by the Fourteenth Amendment to the United States Constitution.

Defendant's Motion to Dismiss is DENIED in all respects. Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 10th day of February, 1982, NUNC PRO TUNC December 18, 1981; the Memorandum Opinion entered December 18, 1981, is withdrawn and this Memorandum Opinion is substituted therefor.

/s/ Lee R. West
United States District Judge

Date of Entry: February 10, 1982

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Twenty-first Amendment to the Constitution of the United States provides:

> "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Article 27, Section 5 of the Constitution of the State of Oklahoma provides:

"Sec. 5. Prohibition of sales to certain persons—Limitation on advertising—Penalties. It shall be unlawful for any licensee to sell or furnish any alcoholic beverage to:

A person under twenty-one (21) years of age; or

A person who has been adjudged insane or mentally deficient; or

A person who is intoxicated.

Sales, gifts or deliveries to persons under twenty-one (21) years of age shall be deemed a felony; and any license issued pursuant to any law, in compliance with this Amendment, shall be revoked, upon conviction for such sale, gift or delivery.

It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store."

Sales to insane, mentally deficient, or intoxicated persons shall be deemed a felony.

Any person under the age of twenty-one (21) years who misrepresents his age, for the purpose of obtaining the purchase of any alcoholic beverage, shall be guilty of a misdemeanor."

Section 516 of the Oklahoma Alcoholic Beverage Control Act, 37 Okla. Stat. Ann. § 516, provides:

> "Sec. 516. Advertising. It shall be unlawful for any person, firm or corporation, to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store," or any combination of such words or any of them and no letter in any such sign shall be more than four (4) inches in height or more than three (3) inches in width, and if more than one (1) line is used the lines shall not be more than one (1) inch apart."

Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3), provides:

> "(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising

market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmissions: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time."

Section 76.55(b) of the rules of the Federal Communications Commission, 47 C.F.R. § 76.55(b), provides:

"(b) Where a television broadcast signal is carried by a community unit, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part."